No. 85-5221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL LAMONT GRIFFITH,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ Of Certiorari To The Supreme Court of Kentucky

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the holding of *Batson* v. *Kentucky* applies to petitioner Griffifth's conviction which was not yet final at the time *Batson* was decided.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OPINIONS BELOW

The Supreme Court of Kentucky affirmed the Judgment entered against petitioner in an unpublished opinion rendered on June 13, 1985 (Appendix, hereafter A 17). No written opinion was filed with the circuit court judgment of conviction entered on May 21, 1984.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3). The Supreme Court of Kentucky affirmed petitioner's conviction in an unpublished opinion rendered on June 13, 1985. The Petition for Writ of Certiorari was filed on August 9, 1985, within the time set by Rule 20.1 of the Rules of the Supreme Court. The Pettion for Writ of Certiorari was granted on June, 2 1986.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Randall Lamont Griffith, was indicted on September 27, 1982, for the offenses of first degree robbery, theft by unlawful taking, and persistent felony offender in the second degree in violation of Kentucky Revised Statutes (KRS) 515.020, KRS 514.030, and KRS

532.080, respectively (Transcript of Record, hereafter TR 1; A2-3). The indictment charged that petitioner had committed robbery by "threatening the use of physical force upon Ms. Collett Ruhl while armed with an ice pick, a dangerous weapon" on or about September 8, 1982 (TR 1; A2). The object of the theft was a purse belonging to Deborah Barnett, a companion of Ms. Ruhl (later called Weist). (Transcript of Evidence, Volume I, hereafter TE I 37, 44-45).

In support of the robbery charge, the prosecution introduced Collett Weist who testified that on September 8, 1982, she and Deborah Barnett stopped on Poplar Level Road near the Magic Mart in Louisville, Kentucky to use the telephone at the phone booth (TE I 36-65). Ms. Barnett asked Ms. Wiest to bring her purse from the car, which she did (TE I 43). Ms. Barnett got her cigarettes from her purse and tossed the purse to the hood of the car where Ms. Wiest was sitting (*Id.*). While Ms. Wiest was sitting on the hood of the car, a black male between 5'5" and 5'7" and 150 pounds, with a short afro, walked up to Ms. Barnett, put his hand on the purse, held a knife up to Ms. Wiest, and picked up the purse (TE I 44-45). He then put the purse under his arm and walked back to the apartment behind him (TE I 46). Ms. Barnett testified similarly. Both women identified petitioner from a photopack.

Stephanie Kittrell testified she was on her way to the store when she saw a man draw a knife and grab a lady's purse (TE II 134). She made an in-court identification of petitioner (TE II 136).

Based on the evidence, the jury returned a verdict of guilty on the charge of first degree robbery and recommended a punishment of ten (10) years, a minimum sen-

tence (TE II 247-248). The punishment was enhanced by the jury, pursuant to Kentucky's Persistent Felon statute, to a total of twenty (20) years (TR 137-138; A 7-8).

Concerning the error complained of here, a jury panel was presented for examination and, in accordance with Kentucky practice, each party was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2),(3)]. (TR 94-96). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory challenges and one extra peremptory due to the calling of extra jurors for examination. RCr 9.40(1), (2). The prosecutor used his peremptory challenges to strike four black jurors (Supplemental Transcript of Evidence, hereafter STE 38; A12-13).[1] Following the prosecutor's strikes, one black juror remained (STE 41; A15). However, after random selection by the Clerk pursuant to Kentucky's rules of court, RCr 9.36, no blacks remained on the panel (STE 41; A 15). As defense counsel, Leo Smith, argued, the result was that:

> . . . [The] defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury . . . (STE 41; A 15).

Defense counsel moved the trial court to require the prosecutor, Joseph Guttman,[2] to state his reasons for exercising his peremptories for the record (STE 35, 36, 40, 41; A 10, 11, 14, 15). Mr. Smith also moved for discharge of the panel on the basis of a violation of his client's constitutional right to a jury made up of a fair cross section of the community (STE 38, 40; A 13, 15). Both

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[1] One of those four black panel members had also been struck by the defense (STE 38; TR 94).

[2] Mr. Gutmann is the same Assistant Commonwealth Attorney who prosecuted the case of *Batson* v. *Kentucky*.

defense motions were overruled (STE 40, 42; A 14, 16). The jury was then sworn for service on Mr. Griffith's case (TE I 35).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky (TR 142; A 8). In an unpublished opinion rendered on June 13, 1985, the Supreme Court of Kentucky rejected petitioner's argument, based on both the Sixth Amendment and equal protection grounds, and held that "*Swain* disposes of this issue and we decline to go further than the *Swain* Court" (A 18). The judgment of the circuit court was affirmed (*Id.*).

On August 9, 1985, petitioner filed his petition for writ of certiorari. *Batson* v. *Kentucky* was decided by this Court on April 30, 1986. Petitioner's writ was granted on June 2, 1986, on the following question:

> "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, ___ U.S. ___, 106 S.Ct. 1712, 89 L.Ed.2d ___ (1986), be given retroactive effect?" *Griffith* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 2274, 2275 (1986).

This Court set petitioner's case for oral argument in tandem with *Brown* v. *United States*, 476 U.S. ___, 106 S.Ct. 2275 (1986). *Griffith*, *supra*.

SUMMARY OF ARGUMENT

This case presents the question left unanswered by the recent decision of *Allen* v. *Hardy*, 476 U.S. ___, 54 U.S.L.W. 3856 (1986). Petitioner Griffith's conviction was on direct appeal to this Court on a petition for writ of certiorari when this Court announced the decision in *Batson* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 1712 (1986). *Allen* held that *Batson* is not to be applied retroactively to

cases on collateral review. Petitioner submits that for the reasons discussed herein, limited retrospective application is mandated.

First, since petitioner's case was pending on direct appeal at the time *Batson* was decided, petitioner should be afforded the benefit of the *Batson* rule without regard to the *Stovall* criteria or to whether *Batson* constituted a "clear break" in the law. Such a ruling would: a) allow this Court to avoid being in position of a super-legislature; b) would comply with the constitutional norm of principled decision-making; c) would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case and d) would further the goal of treating similarly situated defendants similarly.

Second, *Batson* constituted no "clear break" in the law since *Batson* announced no new constitutional principle of law. Rather, *Batson* reaffirmed the principle in *Swain* v. *Alabama*, 380 U.S. 202, 203-204 (1965), that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."

Batson departed from *Swain* only on the question of the standard of proof required of a defendant to establish purposeful discrimination by the prosecution in its exercise of peremptory challenges against minority persons. However, in adopting its evidentiary standard, *Batson* merely applied the established principles of post-*Swain* cases on proof of purposeful discrimination in a particular case to a new set of facts, that is, use of peremptory challenges in choosing a jury.

Batson did not disapprove any practice this Court had arguably sanctioned by prior cases. This Court had specifically disapproved of the use of peremptory challenges

on the basis of race in *Swain* as well as cases predating and post-dating *Swain*.

An analysis of the *Stovall* criteria in petitioner's case supports limited retrospectivity to cases not yet final. First, because the integrity of the truth-finding process is significantly enhanced by the holding of *Batson*, limited retroactivity is mandated. Second, reliance is not an appropriate consideration with respect to the *Batson* holding since any reliance by prosecutors cannot have been justified. *Swain* did not countenance striking jurors on the basis of race. Any reliance on *Swain* by prosecutors striking jurors on the basis of race was not justifiable. Moreover, due to an abundance of criticism of the evidentiary standard of *Swain*, the *Batson* holding concerning standard of proof was foreseeable.

Finally, the effect on the administration of criminal justice of a retrospective application of *Batson* to cases pending on direct appeal would be minimal. The number of cases on direct review pales in comparison with those on collateral review. Moreover many state and federal jurisdictions had already adopted alternative standards, reducing the number of cases affected by *Batson* further. The burden on prosecutors will also be minimal since *Swain* obligated prosecutors to keep information on stricken jurors in order to meet a challenge under *Swain*.

All factors considered, this Court should hold that *Batson* applies to convictions that were not yet final when *Batson* was decided.

ARGUMENT

THE UNITED STATES SUPREME COURT'S DECISION IN *BATSON* V. *KENTUCKY*, 476 U.S. ____, 106 S.Ct. 1712 (1986), SHOULD BE APPLIED RETROACTIVELY TO PETITIONER'S CASE WHICH WAS NOT YET FINAL[3] AT THE TIME *BATSON* WAS DECIDED.

A. *Batson* v. *Kentucky*, A Progeny of *Swain* v. *Alabama*

Batson v. *Kentucky*, 476 U.S. ____, 106 S.Ct. 1712 (1986), involved facts strikingly similar to those in the present case. In *Batson*, during the criminal trial of a black man, the prosecutor used his peremptory challenges to strike all four black persons on the venire. An all-white jury was then selected despite the defense motion to discharge the jury panel based upon Sixth and Fourteenth Amendment violations. The defense request for a hearing was also denied.

In *Batson*, this Court reaffirmed the principle in *Swain* v. *Alabama*, 380 U.S. 202 (1965), that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Batson*, 106 S.Ct., at 1716, citing *Swain*, 380 U.S., at 203-204. This Court recognized that "[t]his principle has been consistently and repeatedly reaffirmed, . . . in numerous decisions of this Court both preceding and following *Swain*." *Batson*, 106 S.Ct., at 1716.

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[3] "'By final . . . [is meant] where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in' *Batson* v. *Kentucky*." *Allen* v. *Hardy*, 476 U.S. ____, 54 U.S.L.W. 3856, n.1 (June 30, 1986), quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 622, n.5 (1965).

Batson departed from *Swain* only on the question of defendant's standard of proof of an equal protection violation in the context of peremptory challenges. *Allen*, 54 U.S.L.W., at 3857. In *Swain*, this Court held that since the presumption in any case is that the prosecutor is using the State's peremptories to obtain a fair and impartial jury, this presumption is not overcome by allegations that in a case at hand all blacks were removed from the jury. *Id.*, 380 U.S., at 222. *Swain* went on to state that it was impermissible for a prosecutor to use his or her challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224. Thus, under *Swain* a black defendant could establish a prima facie case of purposeful disrcimination through proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* *Swain* suggests that an inference of discrimination could be raised "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223.

To the extent that lower courts had interpreted *Swain* to require proof of repeated striking of blacks over a number of cases to establish a violation of the Equal Protection Clause, *Batson* rejected this evidentiary formula for proof of discrimination "as inconsistent with standards that have developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Batson*, 106 S.Ct., at 1721. This Court in *Batson* acknowledged that "since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Batson*, 106 S.Ct., at 1722; (emphasis in original).

Specifically addressing the issue of proof in a case of purposeful discrimination involving the use of peremptories, this Court held:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, [citation omitted], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [Citation omitted]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination. *Id.*, at 1722-1723.

Since *Batson* merely reiterated the long-standing constitutional principle of *Swain*, *Batson* represented no clear break in the law. As recently stated by this Court in *Shea* v. *Louisiana*, 470 U.S. ___, 105 S.Ct. 1065, 1069 (1985), unless a constitutional rule "is so clearly a break

with the past that prior precedents mandate nonretroactivity, . . . [the] new . . . rule is to be applied to cases pending on direct review when the rule was adopted." In *United States* v. *Johnson*, 457 U.S. 537, 551 (1982), a clear break case is described as one in which this Court "disapproves a practice this Court arguably has sanctioned in prior cases."

Applying these definitions to *Batson*, it is clear *Batson* did not come within a "clear break" exception for retroactivity. *Batson* established no new principle of constitutional law but reiterated the long-standing prohibition against the practice of racial discrimination in jury selection.

The standard of proof adopted in *Batson*, while it differed from the standard discussed in *Swain*, was well-grounded in long-standing precedents of this Court on proof of purposeful discrimination. This Court in *Batson* specifically recognized this, stating:

> These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Corp.* [429 U.S. 252 (1977)], that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions. [Citation omitted]. *Id.*, 106 S.Ct., at 1722.

Petitioner comes before this Court on the same issue recently decided in *Batson*. In his case, the same prosecutor in the Jefferson Circuit Court who prosecuted *Batson*, struck four of five black veniremen, using four of his six peremptory challenges. The prosecutor declined to give reasons for his exercise of the strikes despite a

defense motion. The remaining black juror was randomly selected by the clerk for exclusion from the jury. Thus, no blacks sat on petitioner's jury. Based on these facts, petitioner is clearly entitled to relief under the holding of *Batson*. The only issue to examine, thus, is whether *Batson* is to be applied retroactively to petitioner's case which was pending on direct appeal at the time *Batson* was decided.[4]

B. An Overriding Criterion For Determining Retroactivity Is Whether The Case Presently Before This Court Is On Direct Appeal or Under Collateral Review.

This Court has distinguished between cases arising on direct appeal or under collateral review when considering whether a constitutional ruling is to be given retroactive effect or not. Prior to 1965 this consideration was insignificant since until then, a general rule of retrospective application to all cases prevailed for constitutional decisions of the Court. In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court held for the first time that a newly adopted constitutional ruling need not be given full retroactive application. Prior to *Linkletter*, "both the common law and . . . [this Court's] own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." *United States* v. *Johnson*, 457 U.S., at 542, citing *Robinson* v. *Neil*, 409 U.S. 505, 507 (1973).

In *Linkletter*, this Court addressed the question of whether the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), should apply to state convictions which had become final before the *Mapp* decision. This Court

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[4] *Griffith* was pending before this Court on his writ for petition of certiorari at the time *Batson* was handed down.

acknowledged in the beginning of *Linkletter* that cases pending on direct review when *Mapp* was decided had already received the benefit of *Mapp's* rule. *Linkletter*, 381 U.S., at 622, n.4.

Employing the test of "weigh[ing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," *Id.*, 381 U.S., at 629, this Court concluded the *Mapp* rule should not apply to convictions that had become final before the *Mapp* decision.

In *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406 (1966), this Court also determined, after applying the *Linkletter* test, that the rule of *Griffin* v. *California*, 380 U.S. 609 (1965) (prohibiting comment on a state defendant's failure to testify) was nonretroactive to convictions final before the *Griffin* decision. This Court again confirmed that there was "no question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced." *Tehan*, 382 U.S., at 409.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court departed from this basic tenet and held that this Court could, in the interest of justice, balance three factors to determine whether a "new" constitutional rule should apply retrospectively or prospectively:

> a) the purpose to be served by the new standards;
>
> b) the exent of the reliance by law enforcement authorities on the old standards; and
>
> c) the effect on the administration of justice of a retroactive application of the new standards.
>
> *Stovall*, 388 U.S., at 297.

In the interim between *Stovall* and *United States* v. *Johnson*, the retroactivity determinations often varied from case to case as this Court applied the *Stovall* balancing process. "Because the balance of the three *Stovall* factors inevitably has shifted from case to case, it is hardly surprising that, for some, the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by the beast of prey in search of its intended victim." *United States* v. *Johnson*, 457 U.S., at 544, citing *Mackey* v. *United States*, 401 U.S. 667, 676 (1971) (separate opinion of Harlan, J.).

The basis for distinction between cases on direct appeal and those on collateral review in retroactivity determinations is found as early as 1801 in *United States* v. *Schooner Peggy*, 5 U.S. 103, 110 (1801), where Chief Justice Marshall wrote:

> It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . [And] where individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

"In a consistent stream of separate opinions since *Linkletter*, Members of this Court have argued against selective awards of retroactivity. Those opinions uniformly have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the

law-changing decision should be entitled to invoke the new rule." *United States* v. *Johnson*, 457 U.S., at 545.[5]

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[5] See, *e.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 337 (1980) (POWELL, J., with whom STEVENS, J., joined, concurring in judgement); *Harlin* v. *Missouri*, 439 U.S. 459, 460 (1979) (POWELL, J., concurring in judgments); *Hankerson* v. *North Carolina*, 432 U.S. 233, 245 (1977) (MARSHALL, J., concurring in judgment); *id.* at 246, (POWELL, J., concurring in judgment); *United States* v. *Peltier*, 422 U.S. 531, 543 (1975) (Douglas, J., dissenting); *Daniel* v. *Louisiana*, 420 U.S. 31, 33 and n. (1975) (Douglas, J., dissenting); *Michigan* v. *Tucker*, 417 U.S. 433, 461 (1974) (Douglas, J., dissenting); *Michigan* v. *Payne*, 412 U.S. 47, 58 (1973) (Douglas, J., dissenting); *id.*, at 59, (MARSHALL, J., dissenting); *Adams* v. *Illinois*, 405 U.S. 278, 286 (1972) (Douglas J., with whom MARSHALL, J., concurred, dissenting); *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.); *id.*, at 713 (Douglas, J., with whom Black, J., concurred, dissenting); *Williams* v. *United States*, 401 U.S. 646, 665 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Coleman* v. *Alabama*, 399 U.S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef* v. *New Jersey*, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins* v. *Delaware*, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting); *Desist* v. *United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting); *id.*, at 256 (Harlan, J., dissenting); *id.*, at 269 (Fortas, J., dissenting); *Fuller* v. *Alaska*, 393 U.S. 80, 82 (1968) (Douglas, J., dissenting); *DeStefano* v. *Woods*, 392 U.S. 631, 635 (1968) (Douglas J., with whom Black, J., joined, dissenting); *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967) (Douglas, J., dissenting); *id.*, at 303 (Black, J., dissenting); *Johnson* v. *New Jersey*, 384 U.S. 719, 736 (1966) (Black, J., with whom Douglas, J., joined, dissenting); *Whisman* v. *Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, at 419 (Black, J., with whom Douglas, J., joined, dissenting); *Linkletter* v. *Walker*, 381 U.S. 618, 640 (Black, J., with whom Douglas, J., joined, dissenting). Citations from *United States* v. *Johnson*, 457 U.S. at 545-546, n.9. *See e.g.*, *Solem* v. *Stumes*, 465 U.S. 638, 651 (1984) (POWELL, J., concurring); *Shea* v. *Louisiana*, 470 U.S. ____, 105 S.Ct. 1065, 1074 (1985) (REHNQUIST, J., dissenting).

As this Court recognized in *United States* v. *Johnson*, Justice Harlan delineated three norms of constitutional ajudication violated by this Court's failure to apply new constitutional rules to cases pending on direct appeal at the time of the constitutional decision in his well renowned opinions in *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (dissenting opinion), and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion). First, Justice Harlan argued this Court's "ambulatory retroactivity doctrine" cut this Court loose from the force of precedent, "mitigat[ing] the practical force of *stare decisis*." *Mackey*, 401 U.S., at 681.

Second, Justice Harlan accurately characterized the basic unfairness of applying a new constitutional rule to one litigant before this Court while failing to apply it to other litigants with cases pending on direct appeal at the time of the rule's adoption, placing this Court in the role of super-legislature:

> We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review. *Mackey*, 401 U.S., at 678-79.

Finally, Justice Harlan argued that choosing one litigant over others with cases pending on direct review departed from the principle of treating similarly situated defendants similarly:

> [W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law. *Desist* v. *United States*, 394 U.S., at 258-259.

Petitioner submits he should receive the benefit of the *Batson* ruling because his case was pending direct review at the time of the ruling without regard to the balancing test of *Stovall* or to whether *Batson* represented a clear break with the law. Petitioner respectfully submits that this Court should adopt the position of Justice Harlan and so rule. *See Mack* v. *Oklahoma*, 459 U.S. 900 (1982), where the case was remanded per curiam in the light of *United States* v. *Johnson*. The *Mack* case involved the failure of the trial court to give a requested instruction on a defendant's failure to testify. Mack's case was pending on direct appeal when *Carter* v. *Kentucky*, 450 U.S. 288 (1981) was decided. *Mack*, 459 U.S., at 901 (dissenting opinion).

A failure to grant relief to petitioner would indeed reflect simply fishing one case from the stream of appellate review and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule. Petitioner was prosecuted by the same prosecutor as was *Batson*. That prosecutor used the same unconstitutional practice in this case as he did in *Batson*. Both cases came from the same circuit court, albeit different divisions. A

denial of relief to petitioner would indeed be an ironical denial of relief to a "similarly situated defendant."

To apply *Batson* to all cases pending on direct review "(a) would provide a principle of decision-making consonant with the Court's original understanding in *Linkletter* v. *Walker*, [citation omitted] and *Tehan* v. *United States ex rel. Shott* [citation omitted], (b) would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case, and (c) would further the goal of treating similarly situated defendants similarly." *Shea*, 105 S.Ct.,1069 (1985), discussing the holding of *United States* v. *Johnson*, *supra*.

C. The Holdings Of *United States* v. *Johnson* And *Shea* v. *Louisiana* Both Dictate *Batson* Should Be Applied to Petitioner's Case.

In *United States* v. *Johnson*, this Court recognized a threshold test for a retrospectivity determination. "First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *Id.*, 457 U.S., at 549.

"Conversely, where the Court has expressly declared a rule of criminal procedure to be 'a clear break with the past,' *Desist* v. *United States*, [citation omitted] it almost invariably has gone on to find such a newly minted principle nonretroactive." *United States* v. *Johnson*, *supra*. "In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the 'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course." *Id.*, citing *Williams* v. *United States*, 401 U.S. 646 (1971).

"Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." *United States* v. *Johnson*, 457 U.S., at 550.

Petitioner's case fits most readily into the first of these categories. While *Batson* may not have applied settled principles to a new set of facts when the focus is only on *Swain*, it did so in light of the post-*Swain* decisions relied upon in *Batson*. It is true that the principle of *Batson* reaffirmed the constitutional principle of *Swain* that a state's purposeful or deliberate denial to blacks of participation as jurors on account of race violates the Equal Protection Clause. As mentioned earlier, however, the evidentiary principle of *Batson* was contained in the post-*Swain* decisions discussed at length in *Batson*, namely, that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comprable decisions.'" *Id.*, 106 S.Ct., at 1722 quoting *Arlington Heights*, 429 U.S., at 266 n.14. As the Court noted, it is also well established that if a party makes out "a prima facie case of purposeful discrimination by showing that the totality of the facts give rise to an inference of discrimination," the burden shifts to the State to explain the exclusions. *Batson*, 106 S.Ct., at 1721, quoting *Washington* v. *Davis*, 426 U.S. 229, 239-42 (1976), citing *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972).

Batson applied settled constitutional principles to a new set of facts, that is, the area of peremptory challenges. Therefore, *Batson* should be applied retroactively to cases on direct appeal.

On the other hand, *Batson* "did not announce an entirely new and unanticipated principle of law. In general, this Court has not subsequently read a decision to work a 'sharp break in the web of the law,' *Milton* v. *Wainwright*, 407 U.S. 371, 381, n.2, (1972) (Stewart, J., dissenting), unless that ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one.'" *United States* v. *Johnson*, 457 U.S. at 551, citing *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *United States* v. *Johnson* gives the following description of such a "clear break":

> Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, [citations omitted] or disapproves a practice this Court arguably has sanctioned in prior cases [citations omitted], or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. [Citations omitted.] *Id.*, at 551.

Batson did none of these. *Batson* expressly overruled no clear past precedent of this Court. *Batson* expressly reaffirmed the principle of *Swain* declaring a state's purposeful denial to blacks of participation as jurors on account of race an Equal Protection violation. This principle was certainly not new, as both *Swain* and *Batson* recognized the principle dated back to more than a century ago when the Court held in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that the state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded.

The only point on which *Batson* departed from *Swain* was on the standard of proof required for a prima facie case of purposeful discrimination in the context of the state's use of peremptories to strike black jurors at a black

defendant's trial. Thus, *Batson* did not overrule any constitutional principle of *Swain* but merely established a different evidentiary standard which was based on long-standing precedents since *Swain*.

Nor did *Batson* disapprove a practice this Court arguably has sanctioned in prior cases. Far from it. The prosecution's practice of striking all blacks from the jury based on race was specifically *disapproved* of in *Swain*, as well as cases predating and post-dating *Swain*.[6]

Finally, it is equally plain *Batson* does not fall into the third category of cases posing no problem of retroactivity. *Batson* did not hold that the trial court lacked authority to convict or punish James Batson in the first place. Nor did this Court's reading of the Fourteenth Amendment immunize Batson from punishment. The holding in *Batson* reversed the Kentucky Supreme Court's decision and remanded for further proceedings.

In *United States* v. *Johnson* this Court, after concluding that Johnson's case did not fall into any of the three

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[6] *See, e.g., Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935) (*per curiam*); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967) (*per curiam*); *Carter* v. *Jury Commission of Green County*, 396 U.S. 320, (1970); *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Rose* v. *Mitchell*, 443 U.S. 545 (1979); *Vasquez* v. *Hillery*, 474 U.S. ____, 106 S.Ct. 617 (1986).

"The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' [citations omitted.]. *Alexander* v. *Louisiana*, 405 U.S. 625, 626, n.3 (1972). These principles are reinforced by the criminal laws of the United States. 18 U.S.C. Sec. 243. Citation from *Batson*, 106 S.Ct., at 1716, n.3.

categories posing no difficult questions of retroactivity, went on to state, "we next must ask whether that question would be fairly resolved by applying the rule in *Payton* to all cases still pending on direct appeal at the time when *Payton* was decided. Answering that question in the affirmative would satisfy each of the three concerns stated in Justice Harlan's opinions in *Desist* and *Mackey*." *United States* v. *Johnson*, 457 U.S., at 554. Therefore, even if this Court should find *Batson* does not fall into the first category posing no problem for retroactivity, the same conclusion as that reached in *Johnson* is clearly appropriate in petitioner's case.

While this Court, in *United States* v. *Johnson* specifically expressed no view on the retroactivity of decisions construing any constitutional provisions other than the Fourth Amendment, this Court reached the same result in *Shea* v. *Louisiana*, 470 U.S. ____, 105 S.Ct. 1065 (1985). In holding *Edwards* v. *Arizona*, 451 U.S. 477 (1981), retroactive to cases pending on direct appeal at the time of the *Edwards* ruling, this Court stated:

> We now conclude, however, that there is no reason to reach in this case a result that is different from the one reached in *Johnson*. [citation omitted]. There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule. *Shea*, 105 S.Ct., at 1070.

In an approach clearly appropriate to petitioner's case, this Court in *Shea* stated that "Justice Harlan's reasoning—that principled decision-making and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct-review is applicable with equal force to the situation presently before us." *Id.*, 105 S.Ct., at 1070.

D. In Any Event, An Application Of The *Stovall* Criteria Supports The Retroactive Application Of The Holding Of *Batson* To Cases Pending On Direct Appeal At The Time Of The *Batson* Decision.

An analysis which predates *United States* v. *Johnson* involved the application of the following criteria in order to make a retroactive determination in any given case:

a) the purpose to be served by the new standards;

b) the extent of the reliance by law enforcement authorities on the old standards; and

c) the effect on the administration of justice of a retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. at 297.

Although petitioner has already given reasons why he does not believe this balancing test is appropriate for cases on direct appeal at the time a "new" constitutional rule is announced, he will *arguendo* demonstrate that these criteria also support limited retrospectivity in cases not yet final.

a) Purpose of *Batson* rule

The foremost consideration in this balancing of criteria is the purpose to be served by the new rule. The factors of reliance on the old rule and impact of the new rule on the administration of justice become considerations only "when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small." *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977).

The integrity of the truth-finding process is significantly enhanced by the holding of *Batson* rendering retroactivity to cases pending on direct appeal appropriate. This Court has recognized "that the extent to which the purpose of a new constitutionl rule requires its retroactive

application 'is necessarily a matter of degree.'" *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980), quoting from *Johnson* v. *New Jersey, supra*, 384 U.S., at 729. "Constitutional protections are frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding proces, it may have been designed primarily to foster other, equally fundamental values in our system of jurisprudence." *Brown*, 447 U.S., at 329. "Not every rule that 'tends incidentally' to avoid unfairness at trial must be accorded retroactive effect." *Id.*, quoting from *Gosa* v. *Mayden*, 413 U.S. 665, 680 (1973).

"The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities'" *Stovall*, 388 U.S., at 298, quoting *Johnson* v. *New Jersey*, 384 U.S., at 729.

This Court has acknowledged that "[b]y serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial." *Allen*, 54 U.S.L.W., at 3857. *Allen* also recognized that the *Batson* decision served other values as well. This Court specified two of these purposes: ensuring that states do not discriminate against citizens summoned to sit in judgment against a member of their own race and strengthening public confidence in the administration of justice. *Id.*, at 3857. After noting the other procedures protecting a defendant's interest in a neutral factfinder that *Batson* joins, this Court ultimately concluded in *Allen* that the new rule did not have such a fundamental impact on the integrity of factfinding as to compel retroactive application to cases whose judgments were final at the time of the decision, that is, those arising on collateral review.

While the *Batson* rule may not have had such a fundamental impact on the integrity of factfinding as to compel *complete* retroactivity, it surely does have a fundamental impact. And certainly it has a fundamental enough impact on factfinding to compel the minimally limited retroactivity in question.

This Court has recognized "that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." *Peters* v. *Kiff*, 407 U.S. 493, 500 (1972). In *Williams* v. *Florida*, 399 U.S. 78 (1970), after delineating some essential features of the jury as guaranteed by the Sixth Amendment, this Court concluded that the Sixth Amendment comprehended "a fair possibility for obtaining a representative cross-section of the community." *Id.*, at 100.

In rejecting the exclusion of women from jury service in the federal courts, this Court dicussed the necessity of representation of discernible groups on the jury:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946).

"When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to

assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, 407 U.S., at 503-504. (opinion of Marshall, J.). This removal of human nature and experience from the jury room certainly directly impacts upon the integrity of the truth-finding process.

Of course, prosecutors would not have been indulging in the practice of striking jurors on the basis of race if this did not affect the truth-finding function of the trial itself. It appears self-evident that the reason a prosecutor would eliminate blacks from a jury is in the belief that this will affect the outcome of the case by making a conviction easier to obtain. That belief is supported by sociological studies.[7]

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[7] Social scientists have documented both the tendency of prosecutors to exclude blacks from juries, and the pro-prosecution effect such exclusions may have on a verdict, especially where the government's evidence is insubstantial and the defendant is black. *See, e.g.*, Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev.L. & Soc. Change 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19-22; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 62 (1974); Davis and Lyles, *Black Jurors*, 30 Guild Practitioner 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. St. U.L.Q. 415-37; Ginger, *What Can Be Done to Minimize Discrimination in Jury Trials?*, 20 J.Pub.L. 427 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 1975-80 (1975); H. Kalven and H. Zeisel, *The American Jury* 196-98,

In *Brown* v. *Louisiana*, 447 U.S. 323 (1980), this Court held that the rule of *Burch* v. *Louisiana*, 441 U.S. 130 (1979), that a conviction of a nonpetty criminal offense by a non-unanimous six-person jury violates an accused's Sixth and Fourteenth Amendment right to a jury trial, must be given retroactive effect. This Court recognized in *Brown* that "[t]he right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.*, 447 U.S., at 329, quoting from *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968).

The holding of *Brown* supports petitioner's position for the retroactive application of *Batson* to cases pending on direct appeal. This Court's rationale in *Brown* concerning the purpose of the *Burch* rule is certainly directly applicable to the case at bar:

> In sum, *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial—the very integrity of the fact-finding process." [citation omitted.] "The basic purpose of a trial is the determination of truth," [citation omitted], and it is the jury to whom we have

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210-13 (1966); McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J.Psych. 93 (1976); Rhine, *The Jury: A Reflection of the Prejudices of the Community in Justice on Trial* 41 (D. Douglas & P. Nobel, eds. 1971); R. Simon, *The Jury and the Defense of Insanity*, 111 (1977); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, 33-35, 154-60 (1977).

> entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application. *Brown*, 447 U.S., at 334. (Footnote omitted).

In his concurring opinion in *Batson*, Justice White preliminarily indicated his adherence to the rule announced in *DeStefano* v. *Woods*, 392 U.S. 631 (1968), that *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), holding States could not deny jury trials in criminal cases, did not apply retroactively to cases in which trials began prior to the date of the *Duncan* decision. Justice White also mentioned *Daniel* v. *Louisiana*, 420 U.S. 31 (1975) (per curiam), which held nonretroactive the decision in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), finding the systemic exclusion of women from jury panels a violation of the Sixth and Fourteenth Amendments.

Petitioner respectfully submits both are distinguishable from the case at bar. Both cases considered in *DeStefano*, *Duncan* and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), represented a clear break in the law. Both cases held for the first time that the Sixth Amendment's right to a jury trial was incorporated in the due process clause of the Fourteenth Amendment and, thus, applicable to the states. Those decisions constituted a reversal of prior decisions of this Court holding the Sixth Amendment was not applicable to the States. *DeStefano*, 392 U.S., at 634. Also, as stated in *Bloom*, the proposition that a jury trial need not be provided in contempt cases was "a constitutional principle which is firmly entrenched and which has behind it weighty and ancient authority." *Bloom*, 391 U.S., at 197-198.

Similarly, *Taylor* v. *Louisiana*, which this Court declined to apply retroactively in *Daniel*, represented new law sufficient to be characterized as a clear break. This Court stated in *Taylor*:

> Although this judgment may appear a foregone conclusion from the pattern of some of the Court's cases over the past thirty years, as well as from legislative developments at both federal and State levels, it is nevertheless true that until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his sixth amendment right to trial by an impartial jury drawn from a fair cross-section of the community. *Taylor*, 419 U.S., at 535-536.

On the contrary, the principle of *Batson* that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," is a firmly entrenched concept with weighty and ancient authority behind it. *Swain*, 380 U.S., at 203-204, and *Strauder*, 100 U.S., at 309.

"When the prosecution unconstitutionally uses its peremptory strikes to remove blacks and Hispanics from the jury, the threat to the truth-finding process is not cured by measures designed merely to ensure that white jurors permitted to serve satisfy the legal standard for impartiality." *Allen*, 54 U.S.L.W. at 3857. (Marshall, J., dissenting).

However, this Court has indicated that the *Batson* "rule joins other procedures that protect a defendant's interest in a neutral factfinder." *Allen*, 54 U.S.L.W., at 3857. For example, "*[v]oir dire* examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause." *Id.*, at 3857, n.2.

But, in a case such as the one at bar, there is no federal constitutional right of the defendant to question the potential jurors concerning racial prejudice simply because the offense to be tried involved an alleged criminal confrontation between a black assailant and a white victim. *Ristaino* v. *Ross*, 424 U.S. 589 (1976). *See Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981). *But see Turner* v. *Murray*, 476 U.S. ____, 106 S.Ct. 1683, 1688 (1986), holding that, as a matter of federal constitutional law, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of race." No federal constitutional precept insured that the defense could test the racial prejudices of the potential jurors in the instant case.

But even assuming *arguendo* that the trial judge below would have permitted such a defense inquiry concerning racial prejudice, petitioner's defense counsel may have elected not to inject the issue of racial bias into the voir dire. Such "an inquiry" could "create the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez* v. *United States*, *supra* at 190. As this Court has previously recognized, "it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued." *Id.*, at 192. *See Turner* v. *Murray*, *supra*, 106 S.Ct., at 1688, n.10. It begs reality to suggest that the mere possibility of voir dire questioning on racial prejudice, with its potential negative effects for the defense in any given case, was an adequate procedure to protect a defendant's interest in a neutral fact-finder when the defense had reason to believe the prosecutor's peremptory challenges were being consciously employed

to exclude certain veniremen from the petit jury on account of their race.

According to this Court, these "other mechanisms [which] existed prior to [the] decision in *Batson* creat[ed] a high probability that the individual jurors seated in a particular case were free from bias." *Allen*, 54 U.S.L.W., at 3857. The only other example of such prophylactic "mechanism" or "procedure" catalogued by this Court was the use of a cautionary instruction on passion or prejudice. However, neither the trial judge's orientation of the venirepersons during vior dire nor the jury instructions in the case at bar "emphasize[d] that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice." *Id.*, at 3857, n.2. Kentucky's sparse jury instructions in criminal cases have been previously described by this Court as "rather Spartan." *Taylor* v. *Kentucky*, 436 U.S. 478, 486 (1978).

Since neither voir dire on racial bias nor cautionary instructions on passion or prejudice are constitutionally mandated, even upon defense request, it is difficult to conclude that such discretionary procedures insulated defendants in criminal cases from the calculated impact on the integrity of factfinding generated by the prosecution's efforts to remove from the jury in trials of cross-racial crimes potential jurors of the same race as the defendant.

In this Court's past decisions, when a large group, such as blacks, was "excluded [from jury service] for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possiblity that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community." *Lockhart* v. *McCree*, 476 U.S. ___, 106 S.Ct. 1758, 1765 (1986).

For far more than a century this Court has dealt with racial discrimination. One of the earliest forms of discrimination appeared in the arena of jury selection. This Court has unwaveringly held that exclusion from the jury venire of minority persons violates the Equal Protection Clause. *Strauder*, 100 U.S., at 305.

In a plethora of other areas, judicial decisions have struck down discriminatory actions based on race. For instance, *see Palmore* v. *Sidoti*, 466 U.S. 429 (1984); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

The breadth and history of these cases as well as the anti-discrimination legislation of this country are a reflection of the existence and pervasiveness of racism in this country.

"'[One hundred fourteen] years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.'" *Vasquez* v. *Hillery*, 476 U.S. ___, 106 S.Ct. 617, 624 (1986) citing *Rose* v. *Mitchell*, 443 U.S. 545, 558-559 (1979).

The concept that an all-white jury which is the result of racially-directed peremptory challenges will necessarily be free from bias ignores the historical racism plaguing this country. Only recently this Court acknowledged as much, particularly in cases involving black defendants and white victims such as the case at bar. "Once rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence . . ." *Turner*, 106 S.Ct. at 1688, n.8 (1986). Certainly in light of the historical fact of

racism, the possiblity that a jury will be bias-free cannot dilute the impact of the truth-finding effect of the *Batson* rule.

Only recently this Court has acknowledged the impact of discrimination in selection of the grand jury upon the truth-finding process, rejecting the State's position that such discrimination should be held harmless error:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all a capital offense or a noncapital offense—all on the basis of the same facts. *Vasquez*, 106 S.Ct., at 623 (1986).

The Court concluded such discrimination affected the integrity of the trial process itself, stating, "[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and consequently, the nature or very existence of the proceedings to come." *Id.*, 106 S.Ct., at 623. Discrimination in selection of the petit jury could only have as much if not more impact on the nature of trial proceedings.

In petitioner's particular case, racial discrimination in jury selection may well have had more of an impact upon the truth-finding process than in some other cases since Kentucky has jury sentencing as well as jury guilt-innocence determination.[8] *See Turner* v. *Murray*, 476 U.S. ___, 106 S.Ct. 1683 (1986). In *Turner* this Court reversed the capital conviction due to the trial court's failure to allow the defendant accused of an interracial capital crime to question prospective jurors on the issue of racial bias, recognizing that "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Id.*, 106 S.Ct., at 1687. [Citations omitted.]

Petitioner realizes the purpose of the *Batson* rule is a multi-faceted one serving more than one end. Beside the truth-finding function of the rule, one obvious and very important purpose is that of protecting stricken jurors and society against the invidiousness of racial discrimination. "The harm from discriminatory jury selection extends beyond that inflicted upon the defendant and the excluded juror to touch the entire community." *Batson*, 106 S.Ct., at 1718. "That criminal defendants will not be the only beneficiaries of the rule, however, should hardly diminish our assessment of the rule's impact upon the ability of defendants to receive a fair and accurate trial." *Allen*, 54 U.S.L.W., at 3857, (Marshall, J., dissenting).

The purposes of *Batson* support a retroactive application of that decision to cases pending on direct appeal.

b) Reliance

Due regard for the countervailing consideration of reliance does not weigh against retroactivity. In fact,

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[8] In Kentucky "[w]hen the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court." RCr 9.84(1). *See* KRS 532.060 and 532.070.

reliance is not an appropriate consideration with respect to the *Batson* holding since reliance could not have been justifiable.

While *Baton* can be described *arguendo* as an "explicit and substantial break with prior precedent"[9] on the question of standard of proof, it was certainly not a clear break on the question of the constitutional principle it involved. It merely reiterated the long-standing constitutional precept contained in *Swain* that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain*, 380 U.S. at 204.

Moreover, on the question of standard of proof, the ruling of *Batson* was far from unforeseen. On the subject of a defendant's standard of proof, "[i]n the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism. Since *every* defendant is entitled to equal protection of the laws and should therefore be free from the invidious discrimination of state officials, it is difficult to understand why several must suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object." *McCray* v. *New York*, 461 U.S. 961, 964-965 (1983) (footnote omitted).

Prior to *Batson*, several state courts and two federal circuits had adopted approaches to the problem of proof of discrimination during jury selection which essentially bypassed the *Swain* "case by case" proof requirement usually through a Sixth Amendment analysis or on state constitutional grounds. *See McCray* v. *Abrams*, 750 F.2d

[9] *Allen*, 54 U.S.L.W., at 3857.

1113 (2nd Cir. 1984); *Booker* v. *Jabe*, 775 F.2d 762 (6th Cir. 1985), cert. pending No. 85-1028; *People* v. *Wheeler*, 22 Cal. 3rd 258, 583 P.2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *State* v. *Niel*, 457 So.2d 481 (Fla. 1984); *State* v. *Gilmore*, 299 N.J. Supr. 389, 489 A.2d 1175 (1985); *People* v. *Thompson*, 79 A.D. 87, 435 N.Y.S.2d 739 (2d Dept. 1981), overruled, *People* v. *McCray*, 57 N.Y.2d 342, 457 N.Y.S.2d 441 (1982); *Riley* v. *State*, 496 A.2d 997 (Del. 1985). Some other federal courts held that its supervisory power could be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks in a case. *See United States* v. *Jackson*, 696 F.2d 578 (8th Cir. 1982), and *United States* v. *McDaniels*, 379 F.Supp. 1243 (E.D.La. 1974).

Consequently, it was not the case that prosecutors could not forsee the *Batson* ruling on standard of proof. The proliferation of cases raising the issue of the misuse of peremptory challenges demonstrates that the practice was nationwide prior to the *Batson* ruling.[10] For instance,

[10] *See, e.g., People* v. *Wheeler*, 22 Cal. 3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *State* v. *Neil*, 457 So.2d 482 (Fla. 1984); *People* v. *Payne*, 106 Ill. App. 3d 1034, 62 Ill. Dec. 744, 436 N.E.2d 1046 (Ill. Ct. App. 1982), rev'd 9 Ill. 2d 135, 457 N.E.2d 1202 (1983); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 1 881 (1979); *State* v. *Crespin*, 94 N.M. 2d 486, 612 P.2d 716 (1980); *People* v. *Kagan*, 420 N.Y.S.2d 987 (N.Y.Sup.Ct. App. Div. 1979); *People* v. *Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (N.Y. Sup. Ct. App. Div. 1981); *People* v. *Boone*, 107 Mis. 2d 301, 433 N.Y.S.2d 955 (Sup. Ct. 1980); *People* v. *McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982); *United States* v. *Newman*, 549 F.2d 240 (2nd Cir. 1977); *United States* v. *McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974); *United States* v. *Childress*, 715 F.2d 1313 (8th Cir. 1983); *United States* v. *Whitfield*, 715 F.2d 145 (4th Cir. 1983); *United States* v. *Clark*, 737 F.2d 679 (7th Cir. 1984); *Wheathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983); *Willis* v. *Zant*, 720 F.2d 1212 (11th Cir. 1983).

the Illinois Supreme Court "has reviewed at least 33 cases in which criminal defendants have alleged prosecutorial misuse of peremptory challenges to exclude Negro jurors." *Williams* v. *Illinois*, 466 U.S. 981, 104 S.Ct. 2364, 2365 (1984) (denial of cert.) (Marshall, J., dissenting). The Eighth Circuit has observed "the frequency with which we have been called upon to examine the prosecutor's practices in this regard in the Western District of Missouri." *United States* v. *Jackson*, 696 F.2d 578, 592 (8th Cir. 1982). And the Louisiana Supreme Court reviewed nine cases in seven years from the same parish, five of which involved the same prosecutor. *State* v. *Brown*, 371 So.2d 751 (La. 1979).

Indeed, prosecutors have publicly admitted that they seek to keep blacks from sitting on criminal trials as a matter of course because they fear blacks will be too sympathetic to a defendant. Thus, an instruction book used by the prosecutor's office in Dallas County, Texas, the site of *Hill* v. *Texas*, 316 U.S. 400 (1942), *Akins* v. *Texas*, 325 U.S. 398 (1945) and *Cassell* v. *Texas*, 339 U.S. 282 (1950), advised prosecutors that they did not want a "member of a minority group" on a jury because he will "almost always empathize with the accused." Brown, McGuire, and Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials, Traditional Use or Abuse?* 14 New Eng.L.Rev. 192, 224 (1978).

Aside from the question of foreseeability, the fact that the prosecutorial use of peremptories solely on race was a widespread practice does *not* support a conclusion that prosecutors were justifiably relying on an "old rule." There was no "old rule" which allowed prosecutors to exercise peremptories solely on the basis of race. *Swain* certainly did not allow this. The only question left open in *Swain* was whether defendants would be able to meet the

difficult burden of proof in proving this admittedly unconstitutional prosecutorial practice.

This Court has never held such "[u]njustified reliance [to be] . . . a bar to retroactivity." *Solem* v. *Stumes*, 465 U.S. 638, 646 (1984). Petitioner's case certainly does not demonstrate an arguable situation of justifiable reliance. The prosecutor in this case struck all blacks in *Batson*, and four of five in petitioner's case. The prosecutor has also come under attack in the Kentucky appellate courts for striking all of the black jurors in the following cases:

> *Johnny Earl Williams* v. *Commonwealth*, Ind. No. 85-CR-264, Ky.Ct.Ap. No. 85-CA-2073-MR
>
> *Maurice Debois Gasaway* v. *Commonwealth*, Ind. No. 84-CR-824, Ky.S.Ct. No. 85-SC-494-MR

This pattern of practice, while falling short of the evidentiary standard set out in *Swain*, certainly does not support a finding of justifiable reliance.

"This is not case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on account of their race violated the Equal Protection Clause. All *Batson* did was to give defendants a means of enforcing this prohibition." *Allen*, 54 U.S.L.W., at 3858 (Marshall, J., dissenting).

Thus, "the justifiability of the State's reliance . . . was a good deal more dubious than the justification for reliance that has been given weight in [the] *Linkletter* line of cases." *Robinson* v. *Neil*, 409 U.S., at 510. The consideration of reliance does not support nonretroactive application of *Batson* to cases pending on direct appeal.

c) Effect on the Administration of Justice

The effect of a retrospective application of *Batson* to cases pending on direct appeal on the administration of criminal justice would be minimal. In rejecting the total retroactivity of *Batson*, this Court in *Allen* noted that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice." *Allen*, 54 U.S.L.W., at 3857. The concerns of this Court in the context of collateral review do not apply to cases pending on direct review.

First, the number of cases on direct review would be greatly reduced in comparison to cases on collateral review. Moreover, the number is further reduced in light of the number of state and federal jurisdictions where alternative proof standards had already been adopted under state constitutions, the Sixth Amendment or supervisory powers.[11] Some of those jurisdictions have already addressed specifically the question of retroactivity.[12]

This Court has recognized that there will be no problem in holding evidentiary hearings in cases on direct review since this Court remanded *Batson* for an evidentiary hearing. *Batson*,106 S.Ct., at 1725. The cases on direct appeal would have arisen in about the same time frame as *Batson*, alleviating this Court's concerns with holding hearings in collateral review cases. *Allen*, 54 U.S.L.W., at 3857.

Finally, there should be no burden on prosecutors in explaining their use of peremptories on black jurors in the

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[11] *See* footnote 10, *supra*.

[12] *See, e.g., Commonwealth* v. *Soares*, *supra*, 583 P.2d at 767; *State* v. *Jones*, 485 So.2d 1283 (Fla. 1986); *State* v. *Castillo*, 486 So.2d 565 (Fla. 1986).

few cases to be affected by a limiting retrospectivity ruling. First, the time frame is not too remote. Secondly, since *Swain*, prosecutors who used their peremptories to strike black jurors knew at any time they could be challenged for a pattern of discriminatory practice. As such, prosecutors were constitutionally obligated to keep information about such jurors in order to respond to the challenges made possible under *Swain*.

While under *Swain* prosecutors may not have been required to put reasons for their peremptory strikes against members of a minority race on the record, they clearly were obligated to formulate non-discriminatory reasons for striking jurors. The prosecutor's attempt to explain two of his four challenges in the case at bar suggests that prosecutors were aware of the need to be able to develop a record in the face of a *Swain* challenge long before *Batson*. (A 14).

The minimal impact on the administration of criminal justice clearly supports a ruling of the retroactive application of *Batson* to cases pending on direct review.

CONCLUSION

Petitioner respectfully requests that the decision of the Kentucky Supreme Court in petitioner's case be reversed and that *Batson* v. *Kentucky* be applied retroactively to cases pending on direct appeal at the time *Batson* was decided.

Respectfully submitted,

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